Supreme Court, U.S.
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No. 01-958

IN THE

Supreme Court of the United States

CHRIS WOODALL and
COLUMBIA RIVER GORGE COMMISSION,

Petitioners,

v.

SKAMANIA COUNTY, WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON DIVISION 2

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When a compact agency requires by administrative rule that state law will determine whether a land use has a vested right to continue, does a court err when it applies the state's law on vested rights to a land use dispute in the geographic area covered by the compact?

2. When a compact agency's enabling legislation provides for judicial review of the agency's decisions by state courts, must a reviewing state court defer to a compact agency decision which contradicts the plain meaning of the compact agency's own rules?

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STATEMENT OF THE CASE

The Columbia River Gorge stretches east from the metropolitan area of Portland, Oregon, and slices through the Cascade Mountain Range for approximately 70 miles. The river encased by the Columbia River Gorge is the Oregon/Washington border for the Columbia River Gorge's entire length.

The beauty of the Columbia River Gorge is undeniable and is a primary reason that Congress, Oregon, and Washington agreed to establish the Columbia River Gorge National Scenic Area and the Columbia River Gorge Compact ("compact"). The compact included creation of a bi-state agency called the Columbia River Gorge Commission ("Gorge Commission"). The two states and Congress vested in the Gorge Commission responsibility for preparing a comprehensive blueprint to govern land use in the Columbia River Gorge National Scenic Area.

The land use blueprint developed by the Gorge Commission is The Management Plan for the Columbia River Gorge National Scenic Area ("Management Plan"). Except for the few specifics set out in statute and some minor differences found in county ordinances through which the Scenic Area is directly administered, the Management Plan includes all the normative land use rules for development within the Columbia River Gorge National Scenic Area. The dictates of the Management Plan are universally relied upon by landowners and land use practitioners in the Columbia River Gorge National Scenic Area. The Management Plan also is important to the governments of the six counties whose land geographically makes up the Columbia River Gorge National Scenic Area. By virtue of

the compact legislation, each of these six counties had the option to adopt a land use ordinance to implement the Columbia River Gorge National Scenic Area Act ("Gorge Act"). 16 U.S.C. § 544, *et seq*. These ordinances, however, had to be approved by the Gorge Commission as being consistent with the Management Plan. 16 U.S.C. § 544e.

This case arises out of Skamania County's administration of its Scenic Area land use ordinance ("Scenic Ordinance") which, consistent with 16 U.S.C. § 544e, the Gorge Commission approved. The specific legal provision in dispute, applied by Skamania County from its Scenic Area Ordinance, closely tracks a parallel provision in the Management Plan. Pet. App. at 4a-5a.

Skamania County applied the provision at issue to a landowner who sought permission to continue to operate a ten-site mobile home park. AR at 206-15. The park at one time had ten mobile homes. Currently, the park consists of three mobile homes and seven unoccupied concrete pads. AR 11, 17-19. Skamania County specifically found the owner's nonconforming use as a ten-site park remained a vested right that could continue. The basis for this decision was Skamania County's application of Washington state law as directed by the Management Plan. Pet. App. at 36a-41a; AR 11, 17-19.

On review, the Gorge Commission and a Washington state court of general jurisdiction, both sitting in their appellate capacity, found Skamania County's decision to be in error. *Skamania County v. Woodall ("Woodall")*, 104 Wn. App. 525, 16 P.3d 701, *review denied en banc*, 144 Wn.2d 1021, 34 P.3d 1232 (2001); Pet. App. 18a-35a. The Washington Court of Appeals reversed, finding Skamania

County's action consistent with the Management Plan, Skamania County's Scenic Ordinance, and Washington's common law on vested rights. *Id.*

Respondent takes exception with petitioner's Statement of the Case at page 12 of the Petition where the petitioner contends that the Washington Court of Appeals reasoned that the discontinued standard at issue is a question of vesting even though "no party ever argued that the issue in the case raised a question of vesting." Pet. at 12. Respondent believes petitioner mischaracterized the Washington Court of Appeals' holding and the arguments the parties advanced below.[1]

REASONS FOR DENYING THE WRIT

Accepting petitioners' invitation for review would send several wrong messages to the Columbia River Gorge Commission.

First, the Gorge Commission should be encouraged to clearly articulate the land use rules it promulgated through the Management Plan. Additional judicial review will do nothing to encourage this needed clarity.

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1. Respondent raises this mischaracterization pursuant to its obligation under Sup. Ct. R. 15(2). Petitioners are wrong in writing "the Court reasoned that because the 'discontinued' standard at issue is a question of vesting under Washington law . . ." By making this statement, petitioners confuse the Washington Court of Appeals' actual holding, which was based on (1) the recognition that Washington's law of vested rights includes the legal right of non-conforming uses to continue, and (2) the Court's recognition that the Washington law of vested rights is broader than Washington's vested rights doctrine. Pet. App. 11a-15a.

Second, accepting review only will encourage the Gorge Commission to seek Supreme Court review whenever it disagrees with a state court which has exercised meaningful judicial review over a Gorge Commission appellate decision. Such review is more appropriate when the compact language itself is at issue rather than the terms of the Management Plan. Clearly, the Gorge Commission has the authority to change the Management Plan term if it finds the term offensive to its mission under the compact.

Third, accepting petitioners' invitation will encourage the recent propensity of the Gorge Commission to dispense with the rule of law in the name of protecting the Columbia River Gorge National Scenic Area. *See, e.g., Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 26 P.3d 241 (2001).

Fourth, petitioners argue the nation's body of compact law is confused by conflicting doctrines and urges this Court to use this case as a vehicle for bringing clarity to compact law. If such a need genuinely exists, the Court can do much better than a set of facts where a compact agency effectively is urging the Court to sanction the agency's disregard for the plain language meaning of its own rules.

Fifth, petitioners' allegation of local judicial bias is without empirical and historical foundation. A review of state case law involving the Columbia River Gorge Commission demonstrates considerable respect and deference to the Gorge Commission.

Lastly, petitioners greatly exaggerate the effect the Washington Court of Appeals decision will have on future management of the Columbia River Gorge National Scenic Area.

I. The Better Approach is for the Gorge Commission to Exercise its Institutional Competence Rather than for the Supreme Court to Intervene

Petitioners apparently believe that when an interstate compact agency implements its compact through promulgation of rules, but then determines the plain language of these rules is contrary to what it actually believes are the compact's object and purpose, the compact agency should seek review by the United States Supreme Court rather than rewrite its rules.

Clearly, when a compact agency possesses the authority to achieve through rulemaking what it is seeking from the Supreme Court, the correct approach is for the agency to use the institutional competence vested in it by Congress and the legislatures of the compacting states. This view is grounded in basic tenants of administrative law which include the doctrine of primary jurisdiction and the requirement that agencies must follow their own rules.

To provide protection for the Scenic Area, Congress, Oregon, and Washington provided the Gorge Commission with broadly defined standards and directed the Gorge Commission to implement these standards through preparing a detailed management plan for Scenic Area land use. 16 U.S.C. § 544 (see entire Act for broad standards and § 544d for Management Plan mandate); Wash. Rev. Code § 43.97.015; Or. Rev. Stat. § 196.150. The Gorge Act specifically directed the Gorge Commission to regularly revise or amend the Management Plan as it deems fit. 16 U.S.C. §§ 544d(g) and (h).

Revision or amendment of the Management Plan is a process completely within the authority of the Gorge

Commission. While the doctrine of primary jurisdiction is not implicated in its classic form, the reasoning of the primary jurisdiction doctrine is applicable. Uniformity and consistency in the regulation of Scenic Area land use is better handled through rulemaking adjustments by the agency vested with expertise than by resort to the United States Supreme Court. Ultimately, it is the Gorge Commission and not the courts that is bested suited to change the regulations defining land use rules in the Columbia Gorge National Scenic Area. As this Court noted "it is not for us to write a definition. That is the Administrator's duty." *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 619 (1944).

Further supporting this point is one of the fundamental principles of administrative law — agencies must follow their own rules, particularly when individual rights are affected. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). The Gorge Commission rule at issue in this case is unambiguous. The Gorge Commission clearly has authority to change its rule through its rulemaking authority. 16 U.S.C. § 544d(h). If the Gorge Commission dislikes the Washington Court of Appeals' interpretation of its Management Plan, it need only rewrite the section of the Management Plan at issue. However, the Gorge Commission cannot, through its quasi-judicial function, violate its own rule by ignoring the rule's plain language.

Lastly, petitioners attempt to distinguish the Columbia River Gorge Compact from the Tahoe Regional Planning Compact. Petitioners argue the Lake Tahoe Compact requires the California/Nevada compact entity to consider existing land use standards, while the Gorge Compact includes no such requirement. Pet. at 8. Petitioners fail to reveal that the Columbia River Gorge Compact requires the

Gorge Commission to complete a resource inventory that "documents all existing land uses." 16 U.S.C. § 544d(a)(1)(A). The Columbia River Gorge Compact further requires the Gorge Commission to consider this inventory when developing zoning designations for the Scenic Area. 16 U.S.C. § 544d(b)(1). The Gorge Commission did consider the land use inventory, and the result was its Management Plan directive that state law will determine whether an existing use has a vested right to continue. Pet. App. 11a (quoting the Management Plan).[2]

II. Petitioners Exaggerate the Effect *Woodall* Will Have on Future Management of the Columbia River Gorge National Scenic Area

Petitioners ignore the limiting facts of *Woodall* and thus fall into the trap of reading the teachings of the case too broadly. The most prominent and important conclusion drawn by the *Woodall* court is that unambiguous language in the Management Plan directed that Washington state law governs whether and to what extent a nonconforming use will be permitted to continue. Pet. App. 14a. This specific case fact — that the plain language of the Management Plan directed application of state law — limits the precedential value of the *Woodall* case. Petitioners have not cited to, and respondent is unaware of, any other Management Plan provision which compels application of state law.

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2. The approach of the Gorge Commission is not surprising, given that compact law, like federal law, is interstitial in character. Reference to the underlying state law on a particular issue is a common and recurrent pattern in our system of federalism. *See generally*, Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954).

Strengthening this minimal effect argument further is the point made earlier about the Gorge Commission's delegated authority to amend or revise the Management Plan through rulemaking. The Gorge Commission already may have initiated the rulemaking process of amending its Management Plan to correct any perceived errors in the Washington Court of Appeals' interpretation.

III. Even If Compact Law Is in Need of Clarification, the Facts at Hand Do Not Provide the Court an Apt Vehicle

Respondent will not debate whether the law of interstate compacts is so confused that instruction from the Court is necessary. More germane is that the particular facts of *Woodall* make this case an unsuitable vehicle for this Court to clarify the law of interstate compacts.

1. The Supreme Court Cases Cited by Petitioners do not Support Review

Petitioners cite two cases from this Court for the proposition that interstate compacts cannot be modified through unilateral action by a single state. Pet. at 13-14; *Green v. Biddle*, 21 U.S. (8 Wheat) 1, 40 (1823) (legislation by Kentucky found inconsistent with a prior interstate compact between Kentucky and Virginia); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994) ("no one state can control the course of a Compact Clause entity."). Neither respondent nor the Washington appellate courts disagree with this settled proposition.

The Supreme Court case petitioners cite which is most appropriate for discussion is *State ex rel. Dyer v. Sims*, 341

U.S. 22 (1951). Petitioners properly urge that the case teaches that a political organ of one compact state cannot unilaterally determine the final meaning of an interstate compact term. Pet. at 14. As the Supreme Court noted, this proposition does not require an elaborate argument. *State ex rel. Dyer* at 28. The facts of *Woodall*, however, do not present a violation of this principle.

The *Woodall* facts present an interstate compact where two states each have ceded some of their power to regulate land use for lands surrounding a portion of the Columbia River Gorge. 16 U.S.C. § 544, *et seq*. The express terms of the compact require environmental protection in a specific geographic area and provide for the creation of a bi-state commission (the Columbia River Gorge Commission). The compact directs the bi-state commission to draft, implement, and enforce land use provisions to protect the Scenic Area's resources. *Id.*; Wash. Rev. Code § 43.97.015; Or. Rev. Stat. § 196.150. The terms of the compact also expressly provide that judicial review of actions taken by the bi-state commission are reserved to the state courts of the compacting states — Oregon and Washington. 16 U.S.C. § 544m.

These facts clearly distinguish *Woodall* from *State ex rel. Dyer*. In *State ex rel. Dyer*, West Virginia argued it could not perform its statutory compact duties because performance of those duties violated the state constitution. The effect was a unilateral attempt by West Virginia's executive branch to change the compact. In *Woodall*, two separate entities vested with separate functions by the compacting states disagree over the meaning of the Gorge Commission's administrative rule language, not over the compact. The state appellate court ascertained meaning from the rule's plain language, while the Gorge Commission argues it has statutory authority to interpret

its own rule as it sees fit without regard to existing legal precedent. Oddly, the entity with the power to rewrite the compact term is the one asking the Supreme Court to invoke its authority over the meaning of an administrative rule the entity itself promulgated. This case does not involve the interpretation of the compact — it involves the interpretation of an undefined term in a county ordinance and the plain language of the Gorge Commission's Management Plan.

2. The Federal Circuit and State Court Cases Cited By Petitioners do not Support Review

Petitioners' citation to federal circuit and state cases also is inapposite. Petitioners cite to federal circuit and state cases for the well-established rule that compacts are not subject to state law unless the language of the compact explicitly provides for its application. Pet. at p. 14-15, citing *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Cons. Planning Council*, 786 F.2d 1359 (9th Cir. 1986); *Pievsky v. Ridge*, 98 F.3d 730 (3d Cir. 1996); *Delaware River Port Authority v. State Ethics Comm'n*, 137 Pa. Cmwlth. 170, 585 A.2d 587 (Pa. Cmwlth. 1991); *Malverty v. Waterfront Comm'n of New York Harbor*, 71 N.Y.2d 977, 980, 524 N.E.2d 421, 422 (N.Y. 1988); and *Salmon For All v. Department of Fisheries*, 118 Wn.2d 270, 821 P.2d 1211 (Wash. 1992).

Respondent does not take issue with this well-established rule. The *Woodall* facts, however, do not involve the question of whether application of state law in a compact context must be express rather than implied. In *Woodall*, a compact agency expressly provided by rule that state law should apply, but now argues it does not have to follow the language of its own rule. Pet. App. at 2a-17a. Although the compact treats

the Management Plan like a legislative rule, and although the Gorge Commission drafted the Management Plan and found the county's ordinance consistent with the Management Plan, the Gorge Commission now wants to construe away the Management Plan's plain meaning.

IV. Petitioners' Suggestion of Local Bias Is Unsupported by History

Petitioners' argument that local bias explains the *Woodall* decision is wholly unsupported. Empirical evidence demonstrates Washington upheld Gorge Commission action in four out of six cases.[3] The Gorge Commission has been even more successful in the Oregon appellate courts.[4] The combined total for both states shows the Gorge Commission to be the prevailing party in eight out of ten cases. Petitioners attempt to support their local bias argument by arguing the Washington Court of Appeals failed to give proper deference to the Gorge Commission's interpretation and by likening interstate compacts to international treaties. Neither argument persuades.

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3. *See Schaefco, Inc. v. Columbia River Gorge Commission*, 121 Wn.2d 366, 849 P.2d 1225 (Wash. 1993) (Commission win); *Klickitat County v. State of Washington*, 71 Wn. App. 760, 862 P.2d 629 (Wash. Ct. App. 1993) (Commission win); *Tucker v. Columbia River Gorge Commission*, 73 Wn. App. 74, 867 P.2d 686 (Wash. Ct. App. 1994) (Commission win); *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 26 P.3d 241 (Wash. 2001) (Commission loss). The unpublished *Andersen* case petitioners cite to was a Commission win. The case at issue, of course, was a Commission loss.

4. Respondent is aware of no Oregon state appellate cases which have been decided against the Gorge Commission.

1. Deference is not Appropriate Given the Facts of *Woodall*

A number of reasons argue against deference to the Gorge Commission's proffered meaning of its Management Plan. Set out in this section are the two strongest arguments against deference.

First and foremost is the Gorge Commission's clear and express deferral to state law. Pet. App. at 11a ("Section 10 of the Existing Uses portion of the Commission's Management Plan provides state law applies when dealing with issues of vested rights"). The *Woodall* court parsed the Management Plan language at issue and very persuasively concluded no deferral to the Gorge Commission's interpretation was appropriate because the Management Plan language was unambiguous. Pet. App. at 11a-15a.

Second, the matter of what the "law on vested rights" is in Washington state is a matter which is squarely within the expertise of the Washington courts. Congress and the two states have delegated to the Gorge Commission the job of administering land use in the Scenic Area but not the job of determining Washington state's "law on vested rights." *Compare* 16 U.S.C. §§ 544d and 544e *with* 16 U.S.C. §§ 544m(b)(4) and 544m(b)(6).

2. Petitioners' Comparison of Interstate Compacts to International Treaties is a Poorly-Chosen Analogy

Petitioners support their object and purpose argument by comparing interstate compacts to international treaties. Just as the same word can have different meanings in different

languages argue petitioners, the same term can have different meanings when interpreted under the laws of different states. Pet. at 27-29. If petitioners were asking this Court to interpret the compact's organic act, 16 U.S.C. § 544, such an analogy would be appropriate. It is easy to imagine that each state ratifying a compact might place a different meaning on a compact term. This case, however, involves language used by a bi-state compact agency which, through rulemaking, expressly deferred to state law. This is not a situation where each signatory to the compact must be prohibited from unilaterally determining what the compact means. Instead, it is a situation where the compact agency, the bi-state entity responsible to both states, has spoken clearly. Moreover, the compact agency can unilaterally change the language in question to effect what it believes to be the compact's object and purpose. Respondent concedes that the Gorge Commission's delegated authority includes the power to reject state law on nonconforming uses if it chooses to do so through additional rulemaking.

CONCLUSION

The facts of the case presented to the Court will not assist the Court in clarifying the law of interstate compacts. If clarification is needed, the Court should wait for facts which truly conflict with existing precedent. In addition, the Gorge Commission's ability to legislatively modify the Management Plan language in dispute militates against the importance of the issues in this case. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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